No. 84-498

Office-Supreme Court, U.S.
FILED
SEP 27 1984
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

October Term, 1984

S. E. JOHNSON COMPANY,
THE OHIO ENGINEERING COMPANY,
FRED R. CREAGER & SONS, INC.,
MATCO, INC.,
OAMCO, INC.,
C. P. CALAWAY, INC.,
THE MAUMEE STONE COMPANY,
THE MICHIGAN STONE COMPANY,
WOLCOTTVILLE SAND & GRAVEL CORP. and
J. T. KIRKBY,
Petitioners,

vs.

ARTHUR S. LANGENDERFER, INC. and
NORTHERN OHIO ASPHALT PAVING CO.,
Respondents.

ON PETITION FOR CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI

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September 20, 1984

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

28 pp

QUESTIONS PRESENTED

This Court has never had a case like this one. It is a private antitrust case. Four federal judges have wrestled with it, over a period of eight years, and then divided two to two, over the questions the case brings here for review, as follows:

(1) Whether, as a matter of law, the doctrine of "predatory pricing" can ever apply under Sections 1 and 2 of the Sherman Act to bids submitted to public authority under statutorily required competitive bidding, when the challenged bids, considered individually or collectively, cover all costs and yield a profit.

(2) Whether antitrust laws lay any obligation on the bidder in such case to "maximize profit."

(3) Whether there is any obligation under antitrust laws in such case to bid high enough so as not to "leave money on the table."

(4) Whether in such case it is a violation of antitrust law to submit a bid that is below the costs of competitors.

(5) Whether it is a violation of Section 7 of the Clayton Act to diversify by acquiring other companies, where all 12 challenged acquisitions over a period of 19 years, except only the last one (which did not occur until a year after the complaining competitor had gone out of business) are held not to violate the statute.

(6) Whether it is a departure from the accepted and usual course of judicial proceedings to remand for new trial, instead of entering final judgment for defendants, where:

(a) *on the Sherman Act claim* on which both courts below found the evidence focused on "predatory pricing," the Court of Appeals held the trial court erred in refusing to direct a verdict on that issue for defendants;

(b) *on the Clayton Act claim* the Court of Appeals held the trial court erred in refusing to direct a verdict for defendants on all 12 acquisitions, except only the last, which was in no way a violation of the statute, and could not have injured plaintiff since it did not occur until after plaintiff had gone out of business.

When four judges divide two to two on these questions antitrust law is in a parlous state.

TABLE OF CONTENTS

QUESTIONS PRESENTED I

TABLE OF AUTHORITIES IV

RULE 28 STATEMENT VI

OPINIONS BELOW 2

JURISDICTION TO REVIEW 2

STATUTES INVOLVED 2

STATEMENT OF THE CASE 3

—The Parties 4

—The Violations Alleged 4

—The Result Below 5

—The Complaint Here 6

REASONS FOR REVIEW 8

I. CASE IS REVIEWABLE NOTWITHSTANDING REMAND FOR NEW TRIAL—THE CHALLENGED JUDGMENT IS THE EQUIVALENT OF A "FINAL" JUDGMENT 8

II. THE COURT SHOULD HOLD AS A MATTER OF LAW, THAT IN ANTITRUST LAW THE "PREDATORY PRICING" PRINCIPLE CAN NEVER APPLY TO STATUTORILY REQUIRED PUBLIC COMPETITIVE BIDDING WHERE THE CHALLENGED BIDS COVER ALL COSTS AND YIELD A PROFIT 12

III. CLAYTON ACT ALSO NEEDS THE COURT'S ATTENTION 15

CONCLUSION 21

APPENDIX (Under separate cover)

Opinion of the Court of Appeals for the Sixth Circuit, 729 F.2d 1050 (March 15, 1984) A1

District Court Opinion Denying Motion for Judgment n.o.v. (September 29, 1980) A27

Judgment Entry in Court of Appeals for the Sixth Circuit (March 15, 1984) A36

Order of the Court of Appeals for the Sixth Circuit Denying Rehearing (July 3, 1984) A37

Statutes Involved:

—Sherman Act, 15 U.S.C.

§1 Restraint of Trade (1975) A38

§2 Monopolization (1974) A38

—Clayton Act, 15 U.S.C. §18 (1950)

§18 Acquisition by one Corporation of Stock or Assets of Another A39

TABLE OF AUTHORITIES

Cases

Bradley v. School Board of the City of Richmond (1974), 416 U.S. 696 9

Brown Shoe Co., Inc. v. United States (1962), 370 U.S. 294 9

Cohen v. Beneficial Industrial Loan Corp. (1949), 337 U.S. 541 9

Cox Broadcasting Corp. v. Cohn (1975), 420 U.S. 469 9

Dickinson v. Petroleum Conversion Corp. (1950), 338 U.S. 507 9

Eisen v. Carlisle & Jacquelin (1974), 417 U.S. 156 9
Gillespie v. United States Steel Corporation (1964), 379 U.S. 148 ..... 8, 9, 12
Land v. Dollar (1947), 330 U.S. 731 9
Larson v. Domestic and Foreign Commerce Corp. (1949), 337 U.S. 682 9
Swift & Company Packers v. Compania Colombiana Del Caribe (1950), 339 U.S. 684 9
United States v. General Motors Corp. (1945), 323 U.S. 373 9

Statutes

10 U.S.C. §2304(a) 7
23 U.S.C. §112(B)(a) 7
41 U.S.C. §28 7
C.F.R. §1-2.407.1 7
Clayton Act §7, 15 U.S.C. §18 (1950) 3, 5
Sherman Act §1, 15 U.S.C. §1 (1975) 2, 4
Sherman Act §2, 15 U.S.C. §2 (1974) 2, 4
Ohio Rev. Code:
§123.15 7
§308.13 7
§3706.04(k)(1) 7
§6115.20 7
§6121.04(L)(1) 7

Other

Dunn & Bradstreet Business Failure Record 14, 20

RULE 28 STATEMENT

All parent companies, subsidiaries and affiliates of Petitioners are named in the caption.

RECORD REFERENCES

(A-1) refers to the printed Appendix in the Court of Appeals.

(App.1) refers to the Appendix to this Petition for Certiorari.

No.

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October Term, 1984

S. E. JOHNSON COMPANY,
THE OHIO ENGINEERING COMPANY,
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Respondents.

ON PETITION FOR CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI

Petitioners above named move the Court to issue its writ of certiorari to review the judgment entered by the United States Court of Appeals for the Sixth Circuit in this private antitrust case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit, reported in 729 F.2d 1050, is reproduced in the Appendix hereto. (App.1.)

The opinions of the United States District Court for the Northern District of Ohio, Western Division, are unreported. The District Court's opinion denying Petitioners' Motion for Judgment n.o.v. is reproduced in the Appendix hereto. (App.27.)

JURISDICTION TO REVIEW

The judgment in the Court of Appeals is dated, and was entered March 15, 1984 (App.36); rehearing sought by Respondents was denied July 3, 1984. (App.37.)

This Court has jurisdiction to review under 28 U.S.C. §1254 upon petition for certiorari filed pursuant to 28 U.S.C. §2101(c).

STATUTES INVOLVED

The statutes involved, reproduced in the Appendix, are:

Sherman Act §*1*, 15 U.S.C. §1 (1975) which says:
"Every contract, combination * * * or conspiracy in restraint of trade * * * is * * * illegal * * *."

Sherman Act §*2*, 15 U.S.C. §2 (1974) which says:
"Every person who shall monopolize or attempt to monopolize or combine or conspire with any

other person * * * to monopolize any part of the trade or commerce * * * shall be deemed guilty * * *."

Clayton Act §7, 15 U.S.C. §18 (1950) which says: "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or * * * the whole or any part of the assets of another corporation engaged also in commerce, where * * * the effect of such acquisition may be substantially to lessen competition or to tend to create a monopoly.

* * *

This section shall not * * * prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof * * *."

STATEMENT OF THE CASE

This antitrust case concerns only contracts let by public bidding by the Ohio Turnpike Commission for paving and repairs on the Ohio Turnpike and by the Ohio Department of Transportation for like work on Ohio roads. All else is excluded.

The geographic area involved and the relevant market (as alleged by plaintiff Langenderfer and stipulated for the purposes of this appeal) consisted of such contracts let by the Ohio Turnpike Commission and by the Ohio Department of Transportation in 13 counties in Northwestern Ohio. 729 F.2d at 1053.

—The Parties

Petitioners named in the caption, collectively referred to as "Johnson," are the S. E. Johnson Company, founded in 1929, to engage in highway paving and like work, and its subsidiaries and affiliated concerns, and its President, as follows, 729 F.2d at 1053:

> The Ohio Engineering Company, Fred R. Creager & Sons, Inc., and C. P. Calaway, Inc., wholly owned contracting subsidiaries of Johnson;
>
> Matco, Inc. and Oamco, Inc., affiliated asphalt producers for Johnson and Ohio Engineering;
>
> The Maumee Stone Company and The Michigan Stone Company, operators of limestone quarries;
>
> Wolcottville Sand & Gravel Corp., which formerly operated sand pits; and
>
> J. T. Kirkby who succeeded Sherman E. Johnson as President in 1956. (A-981-982.)

Respondents named in the caption, collectively referred to as "Langenderfer," are Arthur S. Langenderfer, Inc. and its affiliate, Northern Ohio Asphalt Paving Co.

—The Violations Alleged

Johnson was assailed by its competitor, Langenderfer, for antitrust violation. Langenderfer charged Johnson:

(1) *violated Sections 1 and 2 of the Sherman Act.* The charge was that Johnson combined and conspired to drive Langenderfer out of business "by monopolistic and anticompetitive practices" in bidding for the jobs in question. 729 F.2d at 1052. Langenderfer claimed Johnson, in submitting statutorily required competitive bids, did not bid high

enough; it submitted bids "at unreasonably low figures." (A-23, 128, 131, 279.) The Court of Appeals found Johnson "never bid below its own cost," and "consistently made a profit on those successfully bid state highway and turnpike projects." 729 F.2d at 1055, 1056. Langenderfer's claim "at trial (and on this appeal) was that defendants intentionally and consistently bid below the cost level of smaller competitors" and at so low a figure that it "left money on the table." This, according to Langenderfer, was "predatory pricing" since Johnson "could have submitted higher bids and still have won the paving contracts * * *." 729 F.2d at 1056.

(2) *violated Section 7 of the Clayton Act* by making 12 diversifying acquisitions over a period of 19 years. The Court of Appeals held the trial court should have directed a verdict for Johnson "as to all of the acquisitions" except only the last one—the Union Quarries acquisition, which was in no way in violation of the statute. The Union Quarries acquisition could not have damaged Langenderfer for two reasons: (a) the acquisition occurred a year after Langenderfer went out of business, and (b) since Langenderfer measured damages, not by the contracts it lost, but by the contracts it won, it could not have been damaged by the acquisition because Langenderfer had long ceased bidding on such contracts.

—The Result Below

The trial in the Northern District of Ohio, Western Division, before Judge Don J. Young and a jury (pursuant

to jurisdiction granted by 28 U.S.C. §1331), resulted in a verdict of $982,117. The District Court trebled this to $2,946,351 and added attorneys' fees of $344,544 and costs of $18,559 for a total judgment of $3,309,454, plus interest (at 6% from April 2, 1980, to July 30, 1980, and at 8% thereafter). As of July 30, 1984, this would amount to $4,434,068.36.

The Court of Appeals for the Sixth Circuit (Circuit Judges Lively and Wellford and District Judge Wilhoit, sitting by designation) reversed, with District Judge Wilhoit dissenting. The Court of Appeals held the trial court should have directed a verdict in favor of Johnson on the "predatory pricing" claim and on all Clayton Act acquisitions but one—the last one. The trial court held:

> "the major thrust of much of the evidence at trial was aimed at the predatory nature of defendants' bidding."

Other practices alleged against Johnson, the trial court held, 729 F.2d at 1055:

> "were not specifically proved, however, by evidence at trial."

The Court of Appeals agreed "Support for the allegations of other types of anticompetitive conduct was meager at best," and, 729 F.2d at 1055, found:

> "the evidence presented at trial clearly focused on the claim of predatory pricing."

—The Complaint Here

In view of the concurrent findings of both courts below on the Sherman Act claim, and, since the Clayton Act was not violated, the Court of Appeals should have entered

final judgment in favor of Johnson. To refuse to enter final judgment under these circumstances will only:

(1) Further clutter crowded dockets with a meritless lawsuit.

(2) Lodge in the antitrust law the notion that, in statutorily required public bidding, it is unlawful to offer goods and services at a price that covers all costs and yields a profit, but which is lower than it need be to obtain the business. Never before has the cry been heard that alleged monopoly has made prices—not too high—but, as here, *too low.*

(3) Destroy the basis for public competitive bidding required, as in this case, by statute. Ohio Revised Code, Chapters 5525 and 5537. Public contracts generally everywhere must be let by competitive public bidding.*

**In Ohio,* for example, the statutes require contracts to be let to the *"lowest and best bidder"* for work on regional airports, R.C. §308.13; on air quality projects, R.C. §3706.04(k)(l); on public works, R.C. §123.15; on sanitary districts, R.C. §6115.20; on water projects, R.C. §6121.04(L)(1), and many others.

Federal statutes require that contracts made by the Defense Department for public works, buildings, vessels, aircraft and the like go to the *"lowest responsible bidder."* 10 U.S.C. §2304(a). Federal expenditures for highway construction and repair must be awarded by *"competitive bidding,"* 23 U.S.C. §112(B)(a), and all expenditures by executive agencies must be let "to that *responsible bidder* whose bid * * * will be most advantageous to the Government." C.F.R. §1-2.407-1 pursuant to 41 U.S.C. §28.

REASONS FOR REVIEW

This Court should review this case because—

I. CASE IS REVIEWABLE NOTWITHSTANDING REMAND FOR NEW TRIAL—THE CHALLENGED JUDGMENT IS THE EQUIVALENT OF A "FINAL" JUDGMENT

The reason is: *Nothing remains to be tried.*

In view of the findings, all that remains is to apply the law to those findings. When that is done, the result is the end of this case.

This will restore antitrust law and public bidding statutes to the purposes they were intended to serve. It will cut off soaring expenses—which in amounts already incurred are mind boggling. Additionally, decision now will relieve the judicial system from a drain it does not deserve.

To be sure, this Court ordinarily will deny review where a new trial awaits. However, this is not an inflexible rule. As Justice Black, speaking of the District Court's ruling striking from the Complaint, pointed out in *Gillespie v. United States Steel Corporation* (1964), 379 U.S. 148:

> "a decision 'final' * * * does not necessarily mean the last order possible to be made in the case." 379 U.S. at 152.

To the contrary,

> "the requirement of finality is to be given a 'practical rather than a technical construction.'" 379 U.S. at 152.

Here, as in *Gillespie*, decision on the issues presented is "'fundamental to the further conduct of the case,'" 379 U.S. at 152, and the ultimate costs "will certainly be less if we now pass on the questions presented here rather than send the case back with those issues undecided." 379 U.S. at 153.

The *Gillespie* case is in line with this Court's decisions under like circumstances, as is shown by:

Cox Broadcasting Corp. v. Cohn (1975), 420 U.S. 469, 476-487;

Eisen v. Carlisle & Jacquelin (1974), 417 U.S. 156, 170-172;

Bradley v. School Board of the City of Richmond (1974), 416 U.S. 696, 721-724;

Brown Shoe Co., Inc. v. United States (1962), 370 U.S. 294, 306-311;

Land v. Dollar (1947), 330 U.S. 731, 734 Note 2;

Swift & Company Packers v. Compania Colombiana Del Caribe (1950), 339 U.S. 684, 688-689;

Dickinson v. Petroleum Conversion Corp. (1950), 338 U.S. 507, 511-520;

Larson v. Domestic and Foreign Commerce Corp. (1949), 337 U.S. 682, 685 Note 3;

Cohen v. Beneficial Industrial Loan Corp. (1949), 337 U.S. 541, 545-547;

United States v. General Motors Corp. (1945), 323 U.S. 373, 377.

The Court in *Gillespie* noted the considerations that control decision. The discussion is so relevant that, despite its length, it merits quotation here, as follows:

"Under § 1291 an appeal may be taken from any 'final' order of a district court. But as this Court often

has pointed out, a decision 'final' within the meaning of § 1291 does not necessarily mean the last order possible to be made in a case. *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 545. And our cases long have recognized that whether a ruling is 'final' within the meaning of § 1291 is frequently so close a question that decision of that issue either way can be supported with equally forceful arguments, and that it is impossible to devise a formula to resolve all marginal cases coming within what might well be called the 'twilight zone' of finality. Because of this difficulty this Court has held that the requirement of finality is to be given a 'practical rather than a technical construction.' *Cohen v. Beneficial Industrial Loan Corp., supra,* 337 U. S., at 546. See also *Brown Shoe Co. v. United States,* 370 U. S. 294, 306; *Bronson v. Railroad Co.,* 2 Black 524, 531; *Forgay v. Conrad,* 6 How. 201, 203. *Dickinson v. Petroleum Conversion Corp.,* 338 U. S. 507, 511, pointed out that in deciding the question of finality the most important competing considerations are 'the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other.' Such competing considerations are shown by the record in the case before us. It is true that the review of this case by the Court of Appeals could be called 'piecemeal'; but it does not appear that the inconvenience and cost of trying this case will be greater because the Court of Appeals decided the issues raised instead of compelling the parties to go to trial with them unanswered. We cannot say that the Court of Appeals chose wrongly under the circumstances. And it seems clear now that the case is before us that the eventual costs, as all the parties recognize, will certainly be

less if we now pass on the questions presented here rather than send the case back with those issues undecided. Moreover, delay of perhaps a number of years in having the brother's and sisters' rights determined might work a great injustice on them, since the claims for recovery for their benefit have been effectively cut off so long as the District Judge's ruling stands. And while their claims are not formally severable so as to make the court's order unquestionably appealable as to them, cf. *Dickinson v. Petroleum Conversion Corp., supra,* there certainly is ample reason to view their claims as severable in deciding the issue of finality, particularly since the brother and sisters were separate parties in the petition for extraordinary relief. Cf. *Swift & Co. Packers v. Compania Colombiana Del Caribe, S. A.,* 339 U. S. 684, 688-689; *Gumbel v. Pitkin,* 113 U. S. 545, 548. Furthermore, in *United States v. General Motors Corp.,* 323 U. S. 373, 377, this Court contrary to its usual practice reviewed a trial court's refusal to permit proof of certain items of damages in a case not yet fully tried, because the ruling was 'fundamental to the further conduct of the case.' For these same reasons this Court reviewed such a ruling in *Land v. Dollar,* 330 U. S. 731, 734, n. 2, and *Larson v. Domestic & Foreign Commerce Corp.,* 337 U. S. 682, 685, n. 3, where, as here, the case had not yet been fully tried. And see *Cohen v. Beneficial Industrial Loan Corp., supra,* 337 U. S., at 545-547. We think that the questions presented here are equally 'fundamental to the further conduct of the case.' It is true that if the District Judge had certified the case to the Court of Appeals under 28 U. S. C. § 1292(b) (1958 ed.), the appeal unquestionably would have been proper; in light of the circum-

stances we believe that the Court of Appeals properly implemented the same policy Congress sought to promote in § 1292 (b) by treating this obviously marginal case as final and appealable under 28 U. S. C. § 1291 (1958 ed.). We therefore proceed to consider the correctness of the Court of Appeals' judgment." 379 U. S. at 152-154.

Especially is it important that review be granted, where, as here, the case has been fully tried, comes with the facts found, nothing remains to be tried, and the questions presented, once decided, will restore meaning to the antitrust law and to statutes calling for competitive bidding on public contracts.

II. THE COURT SHOULD HOLD, AS A MATTER OF LAW, THAT IN ANTITRUST LAW, THE "PREDATORY PRICING" PRINCIPLE CAN NEVER APPLY TO STATUTORILY REQUIRED PUBLIC COMPETITIVE BIDDING WHERE THE CHALLENGED BIDS COVER ALL COSTS AND YIELD A PROFIT

It is a contradiction in terms to charge "predatory pricing" in statutorily required competitive public bidding under the circumstances of this case.

In pursuit of the spurious theory of "predatory pricing," Langenderfer has usurped the energies of the judicial system in a month-long trial (from March 3, 1980, to April 2, 1980), and appeals thereafter—at tremendous cost to heavily-laden dockets.

Langenderfer has incurred attorneys' fees in the sum of $548,763 (as claimed by Langenderfer's counsel in applying for allowance of fees) and has laid out $102,451.64 in expenses (see District Court's Opinion of January 22, 1981)

amounting, as of May 31, 1980, to $651,214.64 (with four or more years of appeals to go). This recalls Voltaire's experience: he said he had been ruined twice in his life—first, when he lost a lawsuit, and second, when he won one.

Of this staggering sum the trial court ordered Johnson to pay $363,103.

The litigation has imposed a like burden of attorneys' fees and expenses on Johnson.

Antitrust law cannot thrive on such abuse of the judicial process.

What Langenderfer charges, and to which it has bent every piece of evidence it could lay its hands on, is that Johnson ran afoul of the Sherman Act because:

(1) Johnson submitted "unreasonably low" bids to public authorities.

(2) Johnson failed to "maximize profit" on its public bids, a charge itself ridiculous in view of Langenderfer's assertion that "Johnson could have submitted higher bids and still won the paving contracts * * *. 729 F.2d at 1056."

(3) Johnson submitted bids that were less than Langenderfer's costs, thereby shutting Langenderfer out of the market. 729 F.2d at 1056. The bids are secret. No one knows who will be low bidder until the bids are publicly opened. How a bidder is to keep its bids greater than the costs of competitors, Langenderfer does not explain.

Bidding is a hazardous and endangered occupation. Many things can destroy estimates. That is one reason why bankruptcies in the building industry account for a large percentage of all bankruptcies, (*i.e.*, in 1983, more than 16% of all bankruptcies, Dunn & Bradstreet estimates.) As re-

ported in the *Dunn & Bradstreet Business Failure Record* (p. 3) "construction concerns had the strongest rise in failures * * *." In 1981, the last full year for which figures are available, there were 3,514 failures in the construction industry, (*i.e.*, more than 21% of *all* bankruptcies) with liabilities of $851,780,000. (*Id.* p. 9.)

Especially is it a contradiction in terms to speak of "predatory pricing" in a case of public bidding. The object is to obtain for the public the best price. Public bidding statutes cannot survive if the bidder must give—not its best and lowest price—but its highest, in order, as the dissenting judge in the Court of Appeals thought, to "maximize profit." 729 F.2d at 1061.

The moment it appeared that Langenderfer's theory of Sherman Act liability turned on its claim of "predatory pricing," the trial court, in view of its finding that Langenderfer's other claims of antitrust violation "were not specifically proven by evidence at trial," should have dismissed the case out of hand.

Damage to antitrust law from Langenderfer's "predatory pricing" theory calls for this Court's attention. Langenderfer's "predatory pricing" theory, applied to statutorily required public bidding, has gained an aura of respectability—and therefore calls for this Court's attention, since:

(1) two district judges (the trial judge and the dissenting judge in the Court of Appeals) have embraced Langenderfer's theory as Sherman Act law, and

(2) The Court of Appeals, instead of rejecting the "predatory pricing" claim out of hand as nonsense, and inapplicable in a case such as this, rejected the claim only after examining and analyzing it as if it were a legitimate one under the antitrust law and under statutorily required public bidding.

This Court should scotch any such notion as a basis for liability, before it takes root and erodes both the Sherman Act and competitive public bidding. This Court should put its thumb in the dike to stem the flood of like claims this case, if left outstanding, will let loose.

III. CLAYTON ACT ALSO NEEDS THE COURT'S ATTENTION

Langenderfer went out of business in 1978. 729 F.2d at 1053. It discontinued bidding on these contracts in 1978 and sold its paving equipment. (A-13, 54, 120, 129.)

The business died by its own hand.

The Court of Appeals explained:

> "Langenderfer did not diversity its operations, but remained an asphalt paving specialist." 729 F.2d at 1053.

By contrast, Johnson diversified its operations from the beginning. It started business in 1929 as a highway contractor, including asphalt paving. (A-981, 992-994.) It organized The Maumee Stone Company as a subsidiary in 1946 to operate a limestone quarry in Maumee, south of Toledo (A-942) and The Michigan Stone Company in 1952 to supply a large concrete customer in Toledo as well as contractors in Northern Michigan. (A-945-946, 1006-1008.) Michigan Stone has two quarries in South Michigan, but was not a factor in the asphalt paving market here at issue. It did not supply road stone on a regular basis. (A-947.) Its product went mostly to concrete producers, not involved in this case. (A-58, 947-948.) Matco, Inc. and Oamco, Inc. are subsidiaries formed to operate asphalt plants. (A-969.) Sherman E. Johnson headed the organization until his death in 1956 when J. T. Kirkby became President. (A-982.) He has a small ownership interest in

Johnson, Michigan Stone and Maumee Stone of 5%, 3% and less than 1%, respectively. (A-586, 944, 947, 981-982.)

The further diversifying acquisitions challenged by Langenderfer were all in keeping with the diversification that had been going on since 1929. The 12 challenged acquisitions, over a period of 19 years, 1961 to 1979, are as follows:

1961: Wood County Stone Company, now known as The Portage Quarry, was acquired by Maumee Stone. 729 F.2d at 1053.

1961: C. P. Calaway, Inc., a bridge-building concern, was purchased by Johnson. This enabled Johnson to extend its operations to bridge building rather than subcontracting such work to other companies. 729 F.2d at 1053.

1962: Lime City Stone Company, acquired by Maumee, operated a quarry. 729 F.2d at 1053.

1965: Auglaize Stone Company. Maumee Stone, already a one-half owner, acquired the remaining half interest. (A-944-945.) It regularly supplied Langenderfer for its Defiance plant. (A-55.) Langenderfer's three other plants were supplied by its own quarry and by France Stone Quarries. (A-56-57.)

1969: Price Manufacturing Company. Johnson bought asphalt paving equipment and acquired two asphalt plants near Port Clinton and Norwalk, which served three counties east of Toledo. (A-57-63.)

1970: Rocky Ridge. This was not an acquisition of an existing quarry, but was started up by Maumee Stone. The land is leased, not owned. 729 F.2d at 1053.

1970: The Ohio Engineering Company. With this purchase Johnson acquired three asphalt plants at Findlay, Carey and Spore, serving counties south of Toledo. 729 F.2d at 1053.

1971: Fred R. Creager & Sons, Inc. This concern was a small contractor on the verge of bankruptcy. Johnson purchased the stock for $1 and assumption of liabilities. 729 F.2d at 1053.

1972: Northwest Materials, Inc. This was primarily a purchase of equipment and sand leases. The company was being liquidated. The leases were never operated and have since lapsed. 729 F.2d at 1053-1054.

1974: Wolcottville Sand & Gravel Corp. This company had been owned by Sherman E. Johnson since the late 1950's. The stock was formally acquired by Maumee Stone in 1974. It was not a supplier of sand to Northwest Ohio at that time. The sand operation was abandoned because of the increased cost of transportation by rail. (A-967-968.)

1974: Tri-State Sand Pit in Williams County, the northwesterly county in Ohio. (A-931, 966-967.) The sand operation replaced the Wolcottville Sand & Gravel pit. (A-967-968.) The Tri-State Pit primarily supplied concrete customers and also supplied sand to three of Johnson's asphalt plants. (A-933, 940-941, 966-967.)

1979: Union Quarries Company. It operated an asphalt plant, a stone quarry, and a ready-mix concrete plant in Van Wert County. 729 F.2d at 1054.

With respect to each of the acquisitions, except the last, Union Quarries, the owners approached Johnson about the purchase, and not the other way around. (A-295-296, 318-319, 973-974, 982-983.)

Johnson was acquitted of any Clayton Act violation on all of its acquisitions—except only the Union Quarries acquisition. The rejection of most of the Clayton Act claims reduces the remainder to homeopathic proportions, essentially satisfying the Ambrose Bierce definition of a homeopathic dose as one drop mixed with Lake Superior.

Moreover, considering that Union Quarries was acquired in 1979, after Langenderfer had gone out of business, the Clayton Act claim vanishes altogether. The Union Quarries acquisition could not have hurt Langenderfer, or reduced competition, certainly not "substantially," as required by the statutory standard.

Langenderfer, went out of business in 1978, 729 F.2d at 1053, and began the liquidation of its properties, piece by piece. (A-173-175.) It sold its two asphalt plants. The only other property it retained was its office in Toledo. That property was offered for sale and was so listed with a real estate agency. (A-1157-1158.)

Johnson, a diversified contractor, was able to do its own concrete, drainage, dirt, and bridge work. Johnson bid larger jobs and a greater variety of jobs than specialized contractors such as Langenderfer which relied on subcontractors in many instances or bid as a subcontractor for the asphalt work only. (A-179.) As a consequence, the average state highway project awarded to Johnson was almost four times bigger than that awarded to Langenderfer. (A-849-850.)

Johnson had experienced estimators and field superintendents and sophisticated cost control procedures which

included weekly computer reports by project, giving the company a continuing comparison of work done with the bid estimate. (A-989-993, 1049-1050.)

Langenderfer suffered losses on many jobs and did not know whether it had made money on a particular project until the books were audited at the end of each year. (A-227.) Langenderfer's claim for damages was predicated, *not on the jobs it lost, but on the jobs it won.* (A-147-150.)

Johnson made money on its jobs at an average rate of 5.3%. Langenderfer sought to explain this on the ground Johnson charged high prices for materials and thereby subsidized its turnpike and Ohio Department of Transportation jobs.

There was no evidence to support any such claim.

The trial court found "There was no hard evidence at trial establishing the defendants engaged in these specific practices." (A-1164.)

Johnson's affiliated material suppliers sold at published prices to all comers, including Langenderfer and Johnson. (A-795, 998-999.) The material supplying companies operated at a profit significantly above the industry average for like companies. (A-863-864.)

The Court of Appeals rightly found Johnson "was more cost efficient than its competitors and could afford to submit a lower bid on the jobs in question." 729 F.2d at 1056. It "attained economies of scale which enabled it to operate at a much lower cost for paving projects than its competitors." 729 F.2d at 1058. The dissenting District Judge in the Court of Appeals recognized "Johnson's ability to operate at lower costs" but took this as "a perfect climate to predate." This enabled Johnson, the dissenting

judge thought, "to bid paving contracts at price levels above its average total costs but low enough to drive competitors out of the market." 729 F.2d at 1061.

Langenderfer failed by reason of its own shortcomings. Its experience follows the conclusion drawn by *Dunn & Bradstreet Business Failure Record* in its study of "Causes of Bankruptcy," p. 3:

> "Why does one concern survive while another concern in the same line, location, size and age goes under? In all kinds of economic climate, nine out of ten casualties can be traced to the underlying factor of managerial experience and aptitude."

CONCLUSION

This Court should not send this case back for another month of trial, and no one knows how many appeals thereafter.

Here is a fit case for summary judgment.

Langenderfer went out of business, not because of Sherman and Clayton Act violations—but because those statutes were *not* violated. They served their public purpose. That purpose was not, as Langenderfer supposes, to preserve competitors—but, to preserve competition.

To prosper that purpose, and to halt erosion of the statutes calling for public bidding, this Court should review this case.

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September 20, 1984